U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: May 20, 2003

BALCA Case No.: 2002-INA-196
ETA Case No.: P2000-CA-09499503/ML

In the Matter of:

CODE AZURE, INC.,
Employer,

on behalf of

SERGIO GONZALEZ,
Alien.

Appearance: Legal Solution Group[1]
Van Nuys, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Sergio Gonzalez ("Alien") filed by Code Azure, Inc. ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part

[1] The "Notice of Entry of Appearance as Attorney or Representative" form, dated March 31, 1998, lists "Legal Solution Group" as the "Name of Attorney or Representative." The form was signed by Moza Marquez, who is identified as a "Paralegal." (AF 17). The person who consented to this representation is identified as Mohammad Gezerseh (AF 17), who also signed the Application for Alien Employment Certification form, as Employer's Owner. (AF 15-16). On the other hand, Employer's Brief was signed by "Moza Yontov for Legal Solution Group Employer/Alien Representatives."

656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26.

Under section 212(a)(5), an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and Attorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 27, 1998, the Employer, Code Azure, Inc., filed an application for labor certification to enable the Alien, Sergio Gonzalez, to fill the position of "Sample Maker," which was classified by the Job Service as "Supervisor, Garment Mfger" under Occupational Code 786.132-010 of the Dictionary of Occupational Titles ("D.O.T."). (AF 15). The job duties for the position, as stated on the application, are as follows:

> Design and make the first sample of sophisticated quality dress belts for men and women using distinctive high quality Italian leather. Cut pattern and construct belt to fabricate sample. Draw pattern using measuring and drawing instruments. Copy and/or modify belts according to design specifications. Tend machines that cut, punch, rivet, or staple parts of leather. Sketch rough and detailed drawings of belt and write specifications describing factors, such as color scheme and construction. Cut leather into special shapes, making holes and shapes into leather; carve leather. Match the color and select buckles to be attached to belts. Initiate production, supervise and coordinate activities of workers involved in the production of belts. Observe operations to ensure that the finished product meets the company's standard of quality.

(AF 15). The stated job requirement for the position is two years of experience in the job offered. (AF 15).

In a Notice of Findings ("NOF") issued on March 1, 2002, the CO proposed to deny certification on following grounds: 1. The two-year experience requirement does not represent the Employer's actual minimum requirements, because the Alien lacked such experience at the time he was hired by Employer. 2. The Employer rejected qualified U.S. workers for other than lawful job-related reasons. (AF 10-13). The Employer submitted its rebuttal thereto on or about March 20, 2002. (AF 8-9). The CO found the rebuttal unpersuasive and issued a Final Determination, dated April 16, 2002, denying certification on the above grounds. (AF 6-7). On or about May 1, 2002, the Employer filed a Request for Review of the denial of labor certification. (AF 1-5). On June 19, 2002, the Board issued a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief." On or about July 15, 2002, the Employer's Brief was filed in response thereto.

DISCUSSION

Under 20 C.F.R. §656.21(b)(5), "[t]he employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer."

In the NOF, the CO provided specific findings and instructions to the Employer regarding "Corrective Action" of this deficiency, stating, in pertinent part:

> Finding: The requirement of two years experience in the job does not appear to meet your true minimum requirements in that at the time alien was hired (1995), he did not meet the requirement and you trained him or provided the necessary learning opportunities after he was hired.
>
> Corrective Action: You may A) remove the restrictive requirement from the ETA750A form,
>
> or
>
> B) show why it is not feasible to hire anyone with less than the requirement,
>
> or
>
> C) show that the alien obtained the required experience or training elsewhere.....
>
> B) To retain the requirement:

> You must provide substantial documentation that it is not now feasible to hire anyone with less than the requirement...
>
> C) To show alien had required background:
> You must submit an amendment to ETA 750B form signed by alien showing background in items at issue.

(AF 11-12).

The Employer's rebuttal consists of a letter, dated March 20, 2002, signed by Employer's Owner, Mohammad Gezerseh, which states, in pertinent part:

> (B) Your assessment is incorrect. The alien was hired because his experience and knowledge of working with leather. My company buys high quality imported leather and is very expensive; hence I cannot afford to train. The description of the job performed under Item #13 of the ETA 750A is exactly what the alien was hired to do, and is the exact experience he brought to my company. The job calls for a person with a minimum of two years experience.
>
> (C) Alien does have the required background as it is evidence by the amendment dated 8/23/99, and furthermore, by a letter from his previous employer which was sent to EDD on 3/24/00. Copies are enclosed herewith.

(AF 8).

In the Final Determination, the CO rejected the Employer's argument on rebuttal, stating, in pertinent part:

> NOF pointed out that you trained the alien in all the qualifying experience. You rebut that now you are too busy to do any training.
>
> NOF required you to **document** that argument if you were going to make it. You have failed to do so: the requirement is non-compliant with regulations and the petition cannot be approved.

(AF 7).

As outlined above, the Employer's owner stated, in rebuttal, that because his company buys high quality, expensive, imported leather, he "cannot afford to train." Furthermore, he represented that the Alien has the required background as is "evident by the amendment dated 8/23/99, and furthermore, by a letter from his previous employer which was sent to EDD on 3/24/00. Copies are enclosed herewith." (AF 8).

Regarding the sub-issue of the infeasibility to train a U.S. applicant, the CO interpreted Employer's statement on rebuttal that "he cannot afford to train" a U.S. applicant (AF 8) to mean that Employer is "to busy to do any training." (AF 7). In the Request for Review, however, the Employer's owner represented that he had been "misunderstood;" he simply "would not take chances" with inexperienced people, because the material is very expensive; and, "I did not say, 'I am too busy to do any training." Moreover, the Employer represented that the Alien did not need any training because he had gained the experience while working in his home country. (AF 1). The foregoing statement on rebuttal clearly does not constitute adequate documentation as to why to it is not now feasible to hire someone with less than the stated, two years experience in the job offered. Furthermore, the Employer's subsequent statement, in the review request, suggests that the Employer did not intend to pursue the "infeasibility to hire someone with less experience" argument. To the contrary, the Employer simply contends that the

Alien was not trained on the job, because he had the necessary experience at the time he was hired. (AF 1-2).

Regarding the sub-issue of whether the Alien had the necessary qualifying experience at the time he was hired, the Employer represented in its rebuttal that it had enclosed copies of the amendment dated 8/23/99 to the ETA 750B form, and, a letter from the Alien's prior employer, dated March 24, 2000, as supporting documentation. (AF 8).

We note that the rebuttal consisted of the Employer's two-page letter, dated March 20, 2002, without any enclosures. (AF 8-9). Upon review of the entire Appeal File, however, we find that the record does contain an amendment to the ETA 750B form dated August 23, 1999 (AF 45), as well as correspondence, dated March 24, 2000. (AF 21). However, the foregoing documents do not support the Employer's rebuttal.

The full text of the amendment, dated August 23, 1999, signed by the Alien, is as follows:

> The following amendments and/or corrections are in response to your Assessment Notice dated July 16, 1999, pertaining to the ETA 7-50B.
>
> **ALIEN'S QUALIFICATIONS**
>
> 4/98 to present: Peleteria El Salvador, Mesones 132, Mexico D.F.
> 12/93 to 2/95: Peleteria El Salvador, Mesones 132, Mexico D.F.

(AF 45).

Since the foregoing amendment does not specify the job title and/or duties performed by the Alien, it does not support the Employer's contention that the Alien had the necessary experience when he was hired. Furthermore, the amendment does not

modify the initial ETA 750B form regarding the Alien's work experience with the Employer. As clearly stated therein, the Alien was hired by the Employer in March 1995 as a "Sample Maker," and performed duties similar to those listed in the current job opportunity. (AF 44; *Compare* AF 20). The initial ETA 750B form does not indicate any prior experience at the time the Alien was initially hired by the Employer in March 1995. (AF 44). As stated above, the amendment lists periods of unspecified work for Peleteria El Salvador without specifying the nature of the job. (AF 45). Furthermore, we note that prior to being hired by the Employer in March 1995, the Alien only worked for Peleteria El Salvador from "12/93 to 2/95." (AF 45). Accordingly, even assuming that the Alien's work for Peleteria El Salvador was identical with the current job opportunity, the Alien would still have had less than two years experience in the job offered when Employer initially hired him.

Notwithstanding the Employer's statement in rebuttal, the Appeal File does *not* contain a "letter from his previous employer which was sent to EDD on 3/24/00." (AF 8). To the contrary, the only correspondence, dated March 24, 2000, is from the Employer's Office Manager, Kathleen King. (AF 21).

In summary, the Employer hired the Alien in March 1995 to perform the same job as that which is listed as the current job opportunity and the record does not establish that the Alien had any experience at the time of his hiring in 1995. (AF 44). Furthermore, even assuming that the Alien's unspecified work with Peleteria El Salvador from December 1993 to February 1995 constituted experience in the job offered, it was for less than two years. (AF 45). As outlined above, the CO, in the NOF, provided the Employer with specific instructions regarding how to cure the foregoing deficiency. Yet the Employer failed to do so. Accordingly, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

_____

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.